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Forty-fifth session

Summary record of the 941st meeting
Held at Headquarters, New York, on Thursday, 28 June 2012, at 3 p.m.

Chair: Mr. Sikirić. . . . . (Croatia)

Contents

Other business

Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law on Public Procurement (*continued*)

Future work in the area of public procurement and related areas (*continued*)

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The meeting was called to order at 3.20 p.m.

Other business

1. **The Chair** invited the Commission to hear a presentation on a proposal to replace written summary records of its meetings with digital recordings.

2. **Mr. Fruhmann** (Austria), supported by **Mr. Bellenger** (France), said that the Commission should have been informed of the change in its programme of work. It would be preferable to first complete discussion of document A/CN.9/XLV/CRP.2.

3. **Mr. Zhao** Yong (China) said that his delegation had planned its participation in the work of the Commission on the basis of the approved agenda. It would be helpful if the Commission could proceed with its work accordingly.

4. **Mr. Sorieul** (Secretary of the Commission) said that the Chief of the Conference Management Services at the United Nations Office in Vienna was unable to give the presentation at any other time.

5. **The Chair** said that he took it that the Commission agreed to hear the presentation.

6. *It was so decided.*

Presentation entitled "Review of the use of summary records of UNCITRAL" and demonstration of the digital recording system as used by the Committee on the Peaceful Uses of Outer Space and its Legal Subcommittee

7. **Mr. Karbuczky** (Chief of the Conference Management Service at the United Nations Office at Vienna) said that digital audio recordings of meetings were an inexpensive alternative to costly summary records. Audio recordings offered an authentic record of the proceedings in the original language, unmediated by précis-writers, and unlike summary records, were available immediately. In adopting the new cost-efficient and "green" system, the Commission would contribute greatly to the reform of the United Nations.

8. **Ms. Leblanc** (Canada) wished to know what the next step was with respect to the proposed digital recording system.

9. **Mr. Fruhmann** (Austria) said that an executive summary of a full day's worth of discussions, such as the one prepared by the Secretariat, was much more useful for an interested reader than an audio recording of the meetings. He wished to know whether digital recordings would eventually replace both summary records and conference room papers such as those prepared by the secretariat.

10. **Mr. Sorieul** (Secretary of the Commission) said that the proposed digital recording system would replace only summary records, not the documents prepared by the secretariat. The audio files would be made available together with a list of speakers, to help a user know who was speaking at what time. Summary records of the Commission's meetings would continue to be prepared during its next session, in parallel with audio recordings. Commission members would then be able to evaluate the digital recording system and decide whether it could replace summary records.

11. **Mr. Shautsou** (Belarus) said that summary records were more useful than audio recordings for delegates trying to prepare for the Commission's meetings. It would be more difficult to find a specific statement in the audio files than to find the same information in a summary record. Would the audio files be organized by agenda item or organized chronologically so as to enable a researcher to follow the evolution of a topic from year to year?

12. **Mr. Sorieul** (Secretary of the Commission) said that ease of use was critical, which was why summary records would not be eliminated until it was certain that the audio recordings could be used effectively for research. He noted that the low cost of audio recordings also made it possible to record the meetings of the Working Groups, which currently did not receive summary record coverage.

13. **Mr. Bellenger** (France) deplored the meeting time lost to the presentation and the discussion and asked the Secretariat to avoid changing the Commission's programme of work without prior approval from the Commission.

Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law on Public Procurement (*continued*) (A/CN.9/XLV/CRP.2; A/CN.9/WG.I/WP.79)

A/CN.9/XLV/CRP.2 (*continued*)

14. **The Chair** said that the Secretariat had incorporated the words "as recorded in this report" at the end of paragraph 1 of the draft decision, as

requested by the representative of Austria at the previous meeting.

15. **Mr. Fruhmann** (Austria), responding to the Chair's question with respect to paragraph 6 of the draft decision, said that the explanation provided by the secretariat was sufficient.

16. **Mr. Grand d'Esnon** (France) said that he shared the opinion of the United States representative that the first sentence of paragraph 6 was unclear. Since the wording had been used previously, according to the secretariat, he was willing to let the sentence stand for the sake of consistency.

17. **Ms. Leblanc** (Canada), referring to the last preambular paragraph, said that the words "understanding, enactment, interpretation and application" should be put in a more logical order.

18. **Ms. Nicholas** (Secretariat) said that that was a set phrase that had been used in previous Commission documents.

19. **Mr. Loken** (United States of America) said that, contrary to what was stated in paragraph 1, the editing and finalization of the text done by the secretariat was not based exclusively on the deliberations on the Commission but also on the report of the last meeting of the Working Group (A/CN.9/745), which contained the decisions taken by the Working Group regarding changes to the text but did not always contain the final wording.

20. **Ms. Nicholas** (Secretariat) said that the words "at this session and those set out in document A/CN.9/745" could be added at the end of the paragraph.

21. **Mr. Loken** (United States of America) said that it was unclear what was meant by the phrase "other stakeholders dealing with public procurement proceedings" at the end of paragraph 4.

22. **Ms. Nicholas** (Secretariat) said that the text had been taken from the previous year's resolution. The intention had been to include both the State and the suppliers involved in the proceedings. The phrase could be replaced with "others involved in public procurement proceedings".

23. **Mr. Loken** (United States of America) said, with regard to paragraph 5, that it was unclear whether it was necessary to suggest the establishment of a formal mechanism within or by the secretariat for monitoring practices with regard to the Model Law and the Guide. He proposed replacing the first part of paragraph 5 with the following wording: "*Endorses* efforts by the Commission's secretariat to monitor practices and disseminate information with regard to the use of the Model Law and the Guide".

24. *It was so decided.*

25. **Mr. Loken** (United States of America) said that it was unclear whether the word "coordination" in paragraph 6 referred to procurement reform agencies or to coordination with other mechanisms, or if the aim was to highlight the importance of those mechanisms.

26. **Ms. Nicholas** (Secretariat) said that the intention was to stress the importance of the mechanisms. She proposed adding "of" before "other mechanisms" for greater clarity.

27. **Mr. Loken** (United States of America) said that, the phrase starting with "aimed at achieving the increased coordination" should be replaced with the simpler wording that had been used in the previous year's decision.

28. *A/CN.9/XLV/CRP.2, as orally amended, was adopted.*

29. *The Guide to Enactment of the UNCITRAL Model Law on Public Procurement as a whole, as orally amended, was adopted.*

Future work in the area of public procurement and related areas (*continued*) (A/CN.9/XLV/CRP.1/Add.3)

A/CN.9/XLV/CRP.1/Add.3

30. **The Chair** invited the Rapporteur to introduce the section of the draft report of the Commission on the work of its forty-fifth session relating to future work in the area of public procurement and related areas.

31. **Mr. Mugasha** (Uganda), Rapporteur, introduced document A/CN.9/XLV/CRP.1/Add.3.

32. **Mr. Loken** (United States of America) said that the word "possible" should be added before the words "future work" in paragraph 1.

33. *It was so decided.*

34. **Mr. Wallace** (United States of America) said that a model law did not directly regulate anything, but rather provided the basis for the enactment of laws that

did. It would be more accurate to say that a model law provided guidance on procurement planning.

35. **Ms. Nicholas** (Secretariat) said that the word "regulating" could be replaced with "addressing".

36. **Ms. Nicholas** (Secretariat), replying to the question put by the representative of France, said that FIDIC was the French acronym for the International Federation of Consulting Engineers; an explanation to that effect would be given earlier in the text.

37. **Mr. Sorieul** (Secretary of the Commission) said that FIDIC was a non-governmental organization active in the production of model contracts in the field of international engineering and had participated in the work of UNCITRAL in the past.

38 **Mr. Wang** (Norway) said that paragraph 5 should include sustainability and environmental protection among the guidance paper topics being considered by the Commission, as there had been no opposition to including that topic during prior discussion. Accordingly, the second half of the last sentence in paragraph 4 (e), which suggested that capacity-building was considered more important than providing guidance on the topic of sustainability and environmental protection, should be deleted.

39. **Mr. Loken** (United States of America) said that a period could be inserted after the word "necessary" in paragraph 4 (e) and a separate sentence could be constructed out of the last clause, in order to preserve the idea that building required capacity was important.

40. **Mr. Wallace** (United States of America) said that the issue of a contractor being prevented from selling the subject of a concession to another entity without the consent of the Government was already addressed in the Model Law, contrary to what was suggested in paragraph 14.

41. **Ms. Nicholas** (Secretariat) said that the text reflected what had been said in the discussion. She suggested that the paragraph should read: "The Commission also noted that other issues not currently addressed in the UNCITRAL PFIPs instruments might also be appropriately included in any future work on PPS, together with other issues such as whether to prevent a contractor from selling the subject of a concession to another entity without the consent of the Government".

42. **Mr. Wallace** (United States of America) proposed the insertion of the word "possible" before "work and primary issues to be addressed" in the third and fourth lines of paragraph 15.

43. **Mr. Bellenger** (France) said that in paragraph 13 of the French version, "élaborer des règlements" should be replaced by "élaborer des règles". He wished to know what was understood by "engaging investors in the development" of rules and regulations applicable to them. Did it mean that investors would be called on to participate in the Commission's work? He also requested clarification of the "other bodies" referred to in the eighth line of paragraph 15.

44. **Mr. Wallace** (United States of America) said that in several countries, including his own, "notice and comment" process for the adoption of draft regulations afforded interested parties an opportunity to state their views. He suggested that investors might similarly be asked to comment on rules and regulations that were applicable to them, rather than being engaged in their development.

45. **Ms. Nicholas** (Secretariat) suggested the following wording: "... by allowing investors an opportunity to comment on rules and regulations ...". In response to the question put by the representative of France, she said that the other bodies in paragraph 15 referred to non-governmental and intergovernmental organizations present at the current session. She could provide a list, if required.

46. *A/CN.9/XLV/CRP.1/Add.3, as orally amended, was adopted.*

The meeting was suspended at 4.50 p.m. and resumed at 5.10 p.m.

Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts (A/CN.9/748)

47. **Mr. Lemay** (International Trade Law Division), introducing the note by the Secretariat on the system for collecting and disseminating case law on UNICITRAL texts (CLOUT) (A/CN.9/748), said that, at the time the note had been drafted, 116 issues of case-law abstracts dealing with 1,134 cases had been prepared for publication. The network of national correspondents, which was the backbone of the system, was being streamlined in order to strengthen its sustainability and make it more responsive to changing

circumstances. States had accordingly been requested to appoint or reappoint their national correspondents with effect from the first day of the current session; 28 States had complied with that request.

48. The note also reported on the preparation of a digest of case law on the UNCITRAL Model Law on Cross-Border Insolvency. The Commission might wish to consider the desirability of such a project, while the Secretariat might suitably explore the possibility of collaborating with national correspondents and other experts to that end. He reminded the Commission of the resource-intensive nature of CLOUT. In the absence of any increase in resources, the secretariat had refined a project proposal to secure the additional funding required to maintain and develop the system. The project would also pilot a "community of practice" for the benefit of members of the legal community insufficiently aware of UNCITRAL texts, which would be particularly valuable for developing countries and economies in transition. The secretariat was accordingly seeking assistance from States and other donors.

49. **Mr. Wallace** (United States of America) said that the International Institute for the Unification of Private Law (UNIDROIT) had recently discontinued its database, which had been very incomplete. The fact was that a legal database was useful to lawyers only if it covered all cases. The problem was lack of resources, for UNCITRAL just as much as for UNIDROIT. He reminded the Commission of the Library of Congress's Global Information Network (GLIN), whose aim was to make every treaty, regulation, statute and judicial decision available online. Other countries, such as Chile, were involved in similar efforts.

50. **Mr. Sorieul** (Secretary of the Commission) said that the Commission could not offer to take over any aspect of the UNIDROIT database, owing to its own lack of resources. GLIN was of great interest, but it had its own funding problems which could call into question its future existence in its present form. Ideally, CLOUT might be able to develop closer ties with that network; however, caution was in order.

51. **The Chair** raised the question whether the time had come for the Commission to expand its work relating to digests and whether there was a consensus to give a mandate to the secretariat to draft a digest of case law on the UNCITRAL Model Law on Cross-Border Insolvency.

52. **Mr. Loken** (United States of America) expressed support for the idea of such a digest, subject to resource constraints.

53. **Mr. Sorieul** (Secretary of the Commission) said that it was easier to obtain contributions from outside experts for digests than it was to maintain the CLOUT system. The first two digests had benefited from the cooperation of universities and research institutions, which had added material to the CLOUT collection. While digest-related work was not an added burden but served as a spur to the secretariat, it nevertheless remained in the interest of the Commission to attract the free collaboration of outside experts.

54. **Mr. Maradiaga** (Honduras) said that an essential first step would be to secure the involvement of all universities in the Commission's work and thereby help to give more universal coverage to UNCITRAL texts.

55. **Mr. Pérez-Cadalso Arias** (Observer for the Central American Court of Justice) inquired about the approach that was to be adopted to the question of cross-border insolvency, in view of its important implications for criminal law. The Central American Court of Justice was currently setting up a criminal chamber specifically to combat impunity in cases of cross-border crime for which extradition could not be obtained.

56. **Mr. Sorieul** (Secretary of the Commission) said that the UNCITRAL Model Law served as the basis for the Commission's work on insolvency, which was aimed essentially at promoting mutual legal assistance. Future work in that area was yet to be discussed, but States shared an extremely guarded approach to the Commission's possible involvement in criminal law, which was the province, in particular, of the United Nations Office on Drugs and Crime. The Commission had compiled indicators of fraud and did make comments on criminal matters, but it could not go beyond its mandate.

57. **The Chair** said that he took it that the Commission wished to mandate the secretariat to undertake work to prepare a digest of case law on the UNCITRAL Model Law on Cross-Border Insolvency, within the limits of available resources.

Relevant General Assembly resolutions

58. **Ms. Musayeva** (Secretariat) said that the Commission might wish to take note of General

Assembly resolutions 66/94, 66/95 and 66/96, which related directly to its work. She noted that resolution 66/102, on the rule of law, was also relevant to the Commission's work and would be considered under agenda item 21.

59. **Ms. Millicay** (Argentina) regretted that resolution 66/94 merely noted the tradition of alternating the Commission's sessions between New York and Vienna, as that made it difficult to obtain increased funding to maintain that practice. Her delegation considered that, whenever a reference was made to the Commission's operational needs, including the alternation of venues for its sessions, the wording adopted for the resolution should take the form of a recommendation.

60. **Mr. Maradiaga** (Honduras) said that his delegation had made a request to that effect in Vienna in 2011. He endorsed the Argentine suggestion.

61. **Mr. Sorieul** (Secretary of the Commission) said that the secretariat was grateful to delegations that had been seeking to maintain the practice of alternation. The observations of the representative of Argentina had been duly noted by the secretariat, which was open to all suggestions as to how to persuade the General Assembly to continue that practice and maintain and even enhance the Commission's current resource allocation.

62. **Ms. Musayeva** (Secretariat) recalled that, in addition to the aforementioned resolutions, adopted on the recommendation of the Sixth Committee, the General Assembly had in 2011, on the recommendation of the Fifth Committee, adopted resolution 66/246, paragraph 48 of which provided for an increase in non-post resources in order to service the work of the Commission and retain the rotation scheme between Vienna and New York.

63. **The Chair** took it that the Commission wished to take note of General Assembly resolutions 66/94, 66/95 and 66/96.

64. **Ms. Millicay** (Argentina) regretted the Commission's decision to work within existing resources, one of whose effects was to limit the number of printed documents available to delegations. Her delegation called on conference services to make every effort to provide all the necessary documentation.

The meeting rose at 6 p.m.